

ARKANSAS COURT OF APPEALS
ROAF, JUDGE ANDREE LAYTON
NOT PUBLISHED

DIVISION IV

CA06-179

October 25, 2006

KEVIN LANE CUNNINGHAM

APPELLANT

v.

PATRICIA ANN CUNNINGHAM

APPELLEE

APPEAL FROM INDEPENDENCE
COUNTY CIRCUIT COURT,
[NO. DR 2004-483-2]

HONORABLE JOHN N. HARKEY,
CIRCUIT JUDGE

AFFIRMED IN PART;
DISMISSED IN PART

Appellee Patricia (Patty) Cunningham filed for divorce from appellant Kevin Cunningham. The trial court granted the divorce and awarded custody of the couple's son to Patty. The court also ordered Kevin to sell his home at auction and to pay child support retroactive to the date the complaint was filed. Kevin now appeals arguing that the trial court erred in making its decisions regarding custody, support, and sale of the home. We affirm in part and dismiss in part.

The pertinent facts of this case are as follows. Kevin and Patty were married on September 7, 2002. The couple separated approximately six months later, and during that separation, Patty engaged in an affair with an old boyfriend. Patty confessed to the affair after she and Kevin subsequently reconciled. On December 2, 2003, the couple gave birth to a son. Patty eventually engaged in a second affair with Jim Bass, Kevin's friend and on-the-job supervisor. On October 7,

2004, Patty moved out of the home she shared with Kevin; she filed for divorce on October 19, 2004. Patty ultimately became pregnant with Bass's son, who was born on June 3, 2005.

During a hearing on the divorce petition, Patty alleged that Kevin was both physically and mentally abusive, and that on occasion, he had left blue marks on her arms and hands. She testified that Kevin's drinking habits increasingly worsened throughout the marriage and that he became angry when he drank. Patty also claimed that Kevin was addicted to internet pornography. The testimony of Patty's friends, neighbors, and family members substantiated her claims of abuse. Kevin's father, Leon Cunningham, even testified that Kevin had always been hot-tempered and had exhibited "sadistic behavior" on occasion by hurting people and animals. Testimony revealed that everyone, including Kevin, agreed that Patty was an excellent mother.

Kevin makes three arguments on appeal. He first argues that the trial court erred in awarding custody of their son to Patty. Next, he argues that the trial court erred in ordering him to sell his marital home. Finally, Kevin argues that it was error for the trial court to award child support dating from October 26, 2004, a week after Patty filed for divorce.

At the outset, we note that this court does not have the proper jurisdiction to hear Kevin's argument concerning the sale of the marital abode. The appellate court is obligated to raise issues of jurisdiction sua sponte. *Farell v. Farell*, 359 Ark. 1, 193 S.W.3d 734 (2004). In order to avoid piecemeal litigation, appellate court review is limited to final orders, and an order is not final when it adjudicates fewer than all of the claims or rights and liabilities of fewer than all the parties. *Id.* Here, the divorce decree noted that the court failed to rule on the proper division of two checks worth approximately \$9,000 and ordered that the funds be deposited into the registry of the court within thirty days of the entry of the order and that either party could then petition the court for the appropriate distribution of the funds. There is no order in the record disposing of this matter.

Because there is still an unresolved property division issue, we must dismiss, without prejudice, this portion of Kevin's appeal.

However, Rule 2(d) of the Arkansas Rules of Appellate Procedure-Civil allows for appeals from all final orders awarding custody. *See also Ford v. Ford*, 347 Ark. 485, 65 S.W. 2d 432 (2002). In addition, a court's jurisdiction to award child support is distinct from its jurisdiction to grant a divorce; thus, the award of child support, which is crucial to the well-being of children, is a separately appealable issue. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003). Therefore, this court has the authority to consider Kevin's other two arguments on appeal.

Kevin first argues that the trial court erred in granting custody of the couple's son to Patty. The court of appeals reviews child custody cases de novo, but does not reverse absent a finding that the trial court's decision was clearly against the preponderance of the evidence. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Especially in child-custody cases, the trial court receives exceptional deference because of its superior position to evaluate and judge the credibility of the witnesses. *Id.*

It is well settled that the primary concern in child custody cases is the child's welfare and best interest; all other considerations are merely secondary. *Id. Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000). There are several factors to consider when determining the best interest of the child, including the psychological relationship between the parent and the child, the need for stability and continuity in the child's relationship with the parents and siblings, and the past conduct of the parents toward the child. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997). In addition, courts

have determined that a caring relationship with both parents is essential to a child's healthy upbringing. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997).

Kevin argues that the preponderance of the evidence does not support awarding custody of their son to Patty because Patty engaged in two extramarital affairs, cohabitated with Bass in the presence of their son, could not provide their son with a stable environment, and refused to give Kevin visitation rights for a significant period of time. In *Atkinson v. Atkinson*, 72 Ark. App. 15, 32 S.W.3d 41 (2000), the court noted that while it is acceptable to consider adultery when determining the best interests of the child, such conduct is not dispositive of the issue. Extramarital cohabitation in the presence of children has never been condoned in Arkansas and is contrary to the public policy of providing a stable environment for children; thus, it is a significant factor in determining what is in the best interest of the child. *Id.* However, it is also but one factor to consider when determining the best interest of the child and is not dispositive. *See Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985) (upholding the trial court's decision to allow the mother to retain custody of her child if she terminated her living arrangement with a man and allowed no man to whom she was not married to spend the night in her home while children were present). In addition, because the courts consider a healthy relationship with both parents to be essential, evidence that one parent is alienating the child from the other parent is an important factor that can be considered when determining the child's best interest. *Carver, supra.* Finally, it must be noted that custody awards are not made to punish or reward either parent. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996).

Here, while it is true that Patty admittedly engaged in two extramarital affairs, this was only one factor that the court could consider. Similarly, while extramarital cohabitation is not favored in Arkansas, it is also but one factor to consider. Patty testified that, while her she was miserable

in her marriage to Kevin, she regretted engaging in the extramarital affairs and was trying to “make things right.” Both Patty and Bass testified that they had never lived together. Patty did state that she had spent the night with Bass in the presence of her two children; however, these occasions were rare, and facilitated by the need to provide Bass visitation with his son. In addition, both children were relatively young and Patty and Bass planned to marry once their divorces were final.

Kevin also maintains that Patty could not provide a stable environment for Ryan; yet, testimony reveals that Patty initially left the marital home and moved into the women’s shelter because she was afraid of Kevin. She then moved in with her parents in order to get on her feet, and eventually moved into an apartment, with financial aid from Bass. True, Patty had been unemployed for a long time, but she had marketable job skills and her unemployment was necessitated by her two difficult pregnancies. Patty testified that she planned on reentering the workforce soon. In addition, Kevin did not provide any spousal or child support whatsoever during their separation, leaving Patty in the predicament of making it on her own with two children.

Kevin finally argues that Patty refused to allow him visitation with his son when they first separated. However, more than one person testified that Kevin often threatened to take the child away forever, and Patty testified that she offered to follow an official court-ordered visitation schedule but that Kevin refused to agree to one until two months before the hearing. Also, the evidence showed that Patty faithfully followed the visitation schedule once the court put one into place and that she was willing to compromise during the visitation exchanges by meeting Kevin halfway or driving the child directly to Kevin.

Here, while Patty may not have been a good wife to Kevin, everyone, including Kevin, testified that she was an excellent mother. Conversely, there was a great deal of testimony that Kevin was mentally and physically abusive to Patty, was addicted to pornography, and was not

particularly pleasant with children. While the trial court did not specifically reference this fact, the preponderance of the evidence established that Patty was a victim of domestic abuse. The court must consider the effect of domestic violence on the best interests of the child, and a rebuttable presumption of unfitness is created where there is a finding by the preponderance of the evidence that a party engaged in a “pattern of domestic abuse.” Ark. Code Ann. § 9-13-101(c) (Supp. 2005). On these facts, it cannot be said that the trial court erred in finding that it was in the child’s best interest for Patty to have custody.

Kevin maintains that the trial court failed to make specific findings as to his son’s best interests as required in *Ford, supra*. However, *Ford* only reiterates that the best interest of the child is the polestar in every child custody case; it does not require a list of findings. In addition, when the trial court fails to make findings of fact, this court, under its de novo review, may nevertheless conclude that a preponderance of the evidence supported the decision. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). Although the trial court did not make a specific list of findings, it did state that it was convinced that it was in the best interest of the “family unit” if Patty were to marry Bass and move both children to Missouri, where Bass had found new employment. Also, Kevin failed to request that the court make specific findings as allowed under Rule 52 of the Arkansas Rules of Civil Procedure.

Kevin’s final argument is that the trial court erred in ordering him to pay child support beginning retroactively from the time that Patty filed for divorce. Kevin specifically argues that the award fails to consider that Patty denied him visitation for a significant amount of time and that Kevin had a stable home with all utilities paid. Kevin also claims to have purchased three tires for Patty in addition to paying most of her outstanding medical bills and continuing to make all payments due on the home, the utilities, and the vehicle.

The amount of child support lies within the sound discretion of the trial court, and will not be overturned absent an abuse of that discretion. *Ford, supra*. Parents have a legal obligation to support their children regardless of the existence of a support order. *Id.* Child support is defined as “only those support obligations which are contained in a decree or order of the circuit court which provides for the support and care of any child or children.” Ark. Code Ann. § 11-9-110(g) (Repl. 2002). In *Martin v. Scharbor*, ____ Ark. App. ____, ____ S.W.3d ____ (Apr. 12, 2006), this court found that appellant’s agreed upon obligation to pay for school clothes and related expenses and to cover uninsured medical and dental procedures for his children was not “in the nature of child support,” but was “in addition to” his scheduled child support payments.

Kevin’s obligation to pay child support is separate and distinct from the issue of visitation. *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993). In addition, Kevin was fulfilling his own financial obligations by paying medical bills that Patty incurred while they were still married. Furthermore, paying the bills and utilities at the marital home were more for Kevin’s benefit than for his son’s, as Kevin was the one who lived in the home. Kevin also admitted that during the year he and Patty were separated, he only provided about \$400 in any type of support. On these facts, it cannot be said that the trial court abused its discretion by requiring Kevin to pay retroactive child support.

Affirmed in part; dismissed in part.

GRIFFEN and VAUGHT, JJ., agree.